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No. 91-636

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

FORT GRATIOT SANITARY LANDFILL, INC.,
Petitioners,

v

MICHIGAN DEPARTMENT OF NATURAL RESOURCES, et al,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS MICHIGAN DEPARTMENT OF NATURAL RESOURCES AND DIRECTOR OF THE DEPARTMENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

GAY SECOR HARDY
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

THOMAS J. EMERY
JAMES E. RILEY
Assistant Attorneys General

Attorneys for Respondent

QUESTION PRESENTED

DOES A STATE STATUTE, WHICH IS PART OF A COMPREHENSIVE ACT CREATING A STATE-WIDE WASTE MANAGEMENT PLAN, DISCRIMINATE AGAINST INTERSTATE COMMERCE ON ITS FACE WHERE IT ALLOWS ONE COUNTY TO EXCLUDE ALL OUT-OF-COUNTY WASTE?

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STATUTES AND ADMINISTRATIVE RULES INVOLVED

Pertinent portions of Michigan statutes and administrative rules involved in this case are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

This case comes before this Court following the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the decision of the United States District Court for the Eastern District of Michigan which, on motion for summary judgment by Petitioner, denied Petitioner's request for a declaratory judgment that portions of the Solid Waste Management Act were unconstitutional.

St. Clair County's solid waste management plan is but one component of the

State of Michigan's solid waste management plan which is created by the collective plans of Michigan's 83 counties. While the St. Clair County plan precludes all out-of-county waste from being disposed of within the county, as authorized by the statutes at issue and as approved by Respondent Director of the Michigan Department of Natural Resources, no allegation was made by Petitioner that the state solid waste management plan prohibits the importation of all out-of-state waste into Michigan's other 82 counties. The state plan was in existence and available to Petitioner at the time the suit was filed. Petitioner could have attempted to litigate the argument it now makes, Petition, p 14, that "[i]ndeed Michigan has closed the borders of all its counties to such traffic unless and

until they elect individually to accept such waste," but chose not to do so.

Rather than present any evidence to support such an allegation, Petitioner moved for summary judgment focusing only on two sections of a comprehensive regulatory act but all the while postulating that the statutes could effectively close Michigan's borders to out-of-state waste if each of Michigan's other 82 counties adopted a plan similar to that of St. Clair County. The facts to test Petitioner's thesis were available. Since it chose not to present them to the trial court, it is inappropriate for Petitioner now to attempt to create the specter of all counties in Michigan collectively acting to close Michigan's borders to out-of-state waste.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS IN ACCORD WITH PRIOR DECISIONS OF THIS COURT AND THOSE OF OTHER COURTS OF APPEALS AND DOES NOT RAISE SUBSTANTIAL QUESTIONS OF CONSTITUTIONAL LAW.

A. Michigan's Solid Waste Management Act.

At the outset, it is important to understand that while Petitioner focuses on one county's solid waste management plan, Michigan's Solid Waste Management Act (SWMA), Mich. Comp. Laws Ann. §§ 299.401-.437 (1991 Supp.), has, as one of its many purposes, the creation of a sophisticated and comprehensive state solid waste management plan. The SWMA is partly in response to Congress' encouragement of solid waste planning on a state level through the Resource Conservation and Recovery Act, 42 U.S.C.

§§ 6901-6992k (1988). The SWMA is also a response to the solid waste problem in Michigan which was caused by inadequate planning for disposal needs and lack of sufficient environmental safeguards in the regulation of disposal facilities.

The SWMA requires each of Michigan's 83 counties to prepare and administer a county solid waste management plan. Mich. Comp. Laws Ann. § 299.432(1). Respondents' App. at 10a. Following their approval by the Director of the Michigan Department of Natural Resources, the collective county plans become the state solid waste management plan. Before their approval by the Director, each of the county plans were required to meet the exhaustive mandates of §30(1) of the SWMA and the administrative rules

promulgated thereunder, which call for a thorough evaluation of existing and projected waste generation rates, current and projected disposal capacity in each county or planning area and specific plans to cure any capacity shortfall. Mich. Comp. Laws Ann. § 299.430(1), Respondents' App. at 5a. The rules, found at 1982 Ann. Admin. Code Supp. R 299.4711, Respondents' App. at 11a, require, inter alia: that the county plan establish the goals and objectives of the maximum utilization of solid waste through resource recovery, including source reduction and source separation; a data base which includes an inventory of existing private and public facilities in the county; evaluation of existing solid waste management and disposal problems by type and volume of waste; demographics of

the county including population densities and projected centers of solid waste generation; current and projected land development patterns and environmental conditions as related to solid waste management system for 5 and 20 year periods; solid waste management system alternatives including resource conservation and resource recovery; alternative systems such as waste energy projects; and site selection criteria for disposal facilities.

County plans must include an "enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which com-

ply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas." Mich. Comp. Laws Ann. § 299.425(1) (1991 Supp.). The plans are to be updated every five years and approved by the Director. Mich. Comp. Laws Ann. § 299.425(2) (1991 Supp.).

The siting criteria set forth in a county plan is of significance since the SWMA specifically provides that local attempts to regulate solid waste disposal areas in a manner inconsistent with the approved plan are not enforceable. Mich. Comp. Laws Ann. § 299.430(4) (1991 Supp.), Respondents' App. at 10a.

In Southeastern Oakland County Incinerator Authority ("SOCIA") v. Avon Township, 144 Mich. App. 39, 44; 372

N.W.2d 678, lv. den. 424 Mich. 891 (1985), the Court of Appeals rejected the township's contention that it could regulate landfill operations:

> "Our review of the records leads us to the conclusion that the state regulatory scheme is too pervasive. The Legislature contemplated significant local input in the development of county plans. MCL 299.427; MSA 13.29(27) and MCL 299.428; MSA 13.29(28). However, once these plans are approved a cohesive scheme of centralized and uniform controls emerge. The director of the DNR is responsible for issuing construction permits, for issuing licenses to operate, and may revoke licenses or condition licensings. We believe from the comprehensiveness of this statutory scheme that the Legislature intended to preempt this field." (Footnotes omitted).

The purpose behind the statutory provisions at issue in this case which allow a county to identify and control the planning area it is to serve[1] has been

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[1]Mich. Comp. Laws Ann. §§ 299.413 (1991 Supp.) and 299.430(2) (1991 Supp.), Respondents' App. at 9a.

explained by the Michigan Court of Appeals on two occasions. In County of Saginaw v. Sexton Corp. of Michigan, 150 Mich. App. 677; 389 N.W.2d 144 (1986), Saginaw County sought an injunction prohibiting Sexton, an operator of a landfill in Saginaw County, from receiving Bay County waste at its facility since importation of out-of-county waste was inconsistent with the state-approved county solid waste management plan. The court stated:

> "The real issue here is whether Act 641 [Solid Waste Management Act] authorizes the state to control the intercounty flow of solid waste material.
>
> * * *
>
> "While the specific requirements governing waste management plans were to be developed by the director of the DNR, the Legislature did instruct that the administrative rules include a provision directing counties to evaluate whether 'the plan area has, and will have during the plan period,

> access to a sufficient amount of available and suitable land * * * to accommodate the development and operation of solid waste disposal areas'. MCL 299.430(1)(h); MSA 13.29(30)(1)(h). The Legislature has thus clearly indicated that a county's reliance on a specific landfill site is to be identified in its waste management plan.
>
> "If the state is to implement a workable solid waste management plan, then the individual county plans on which it is based must be reliable. A county plan which identifies a privately owned facility for the disposal of solid waste only from that county must be enforceable. Were we to construe Act 641 and the administrative rules promulgated thereunder to allow private businesses to operate their facilities in a manner inconsistent with a county waste management plan, we would frustrate the intent of the Legislature in enacting Act 641." Saginaw, 150 Mich. App. at 684-685. (Emphasis supplied).

In Fort Gratiot Charter Twp. v. Kettlewell, 150 Mich. App. 648; 389 N.W.2d 468 (1986), the court upheld a lower court ruling that out-of-county

waste could not be brought into St. Clair County and disposed of in the Kettlewell landfill without the authority for doing so expressed in the county's solid waste management plan. The lower court found that the Solid Waste Management Act and the administrative rules promulgated thereunder prohibited inter-county disposal of waste unless both counties' solid waste management plans identified the site as required by 1982 Ann. Admin. Code Supp. R 299.4711(e)(iii)(C). Respondents' App. at 19a. The Kettlewell landfill was only identified in the St. Clair County plan. The court held:

> "Additionally, enactment of the statutory planning and licensing scheme reasonably relates to the purpose of correcting past planning and licensing inadequacies. By placing primary planning at the county level, the scheme provides for reasoned planning for disposal sites based in part on the county's projected capacities and waste generation

> rates. Each county is permitted to address local concerns and to adapt its plans to local conditions while at the same time safeguarding parochial decision-making by requiring the plan to be approved for inclusion in the state plan. The rules and the act provide a method whereby a county can develop a plan which is workable and will not be disrupted by future disposal of waste from sources not accounted for during the planning process."
> Kettlewell, 150 Mich. App. at 653-654.

These decisions recognize the pervasive state-wide scope of the SWMA and the significance of rationally based local planning. They also recognize that control of importation by a county is essential in defining the planning area to be served and that safeguards exist at the state level to prevent parochial decision-making.

Where this all leads and why it is of such importance is that Petitioner claims

that the statutory provisions which enable a county to exclude out-of-county waste at its border unconstitutionally burdens interstate commerce, yet ignores the fact that the approved county plan at issue was incorporated into the state's solid waste management plan. The state-wide plan has never been alleged to be in violation of the Commerce Clause of the United States Constitution. Petitioner has postulated that if all counties in Michigan are allowed under law to preclude out-of-county waste from being deposited in local landfills, this would constitute a ban at Michigan's borders similar to that found unconstitutional in Philadelphia v. New Jersey, 437 U.S. 617 (1978). Yet, all of the county plans were part of an existing state-wide plan at the time this suit arose and Peti-

tioner has never alleged that the state plan, in fact, prevents out-of-state waste from being deposited in Michigan counties, other than St. Clair County.

For legitimate reasons of public health and welfare, more fully discussed later, the Solid Waste Management Act mandates that, at the least, county officials plan for the needs of county residents. The SWMA allows importation from out-of-county sources if the county officials, employing statutorily based criteria, conclude that adequate capacity exists to meet the needs of not only its residents but of those outside the boundaries of the county. For Petitioner to ignore that the SWMA creates a state-wide solid waste management plan is a significant error having a bearing on the issues

presented. St. Clair's plan must be viewed in context as but one component of the state plan which has not been alleged or shown to create a state-wide isolated trade area of the type prohibited under the Commerce Clause.

B. Commerce Clause Analysis.

The Commerce Clause of the Constitution grants Congress the power "[t]o regulate Commerce ... among the several States ... ." U.S. Const., art. I, § 8, cl. 3. "'Although the clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade.'" Maine v. Taylor, 477 U.S. 131, 137 (1986), quoting from Lewis v. BT Investment Managers, Inc., 447 U.S. 27,

35 (1980). The primary purpose of the Commerce Clause is to ensure that "our economic unit is the Nation." H.P. Hood and Sons, Inc. v. Dumond, 336 U.S. 525, 537 (1949). As this Court has stated, "[w]hat is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation." Baldwin v. G.A.F. Sealing, Inc., 294 U.S. 511, 527 (1935). Nor may a state "isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade." Philadelphia v. New Jersey, 437 U.S. 617, 628 (1978).

This Court has established a "two-tiered approach" in determining whether a state statute is in violation of the Commerce Clause. Brown-Forman Distillers

Corp. v. New York State Liquor Authority, 476 U.S. 573, 578-579 (1986); Maine, 477 U.S. at 138 (1986). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." Brown-Forman Distillers, 476 U.S. at 579 (citations omitted). Once it has been shown that the statute is discriminatory, either on its face or in practical effect, the burden then falls on the state to demonstrate both that the statute "'serves a legitimate local purpose' and that this purpose could not be served as well by available nondiscriminatory means." Maine, 477 U.S. at 138.

This Court has noted that the second-tier analysis is set forth in Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Brown-Forman Distillers, 476 U.S. at 578-579. In Pike, it is stated:

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."
> 397 U.S. at 142. (Citation omitted).

This Court has also recognized that "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." Philadelphia, 437 U.S. at 624 (citations omitted). Economic protectionism can be found either on the face of the statute or in the effect of the

statute. Id., at 626-627. The burden of establishing statutory discrimination falls on the party challenging the validity of the statute. Hughes v Oklahoma, 441 U.S. 322, 336 (1979).

Despite the well-developed body of precedent established by this Court for dormant Commerce Clause analysis, this Court has recognized "that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause and the category subject to the Pike v. Bruce Church balancing approach." Brown-Forman Distillers Corp., 476 U.S. at 579. However, this Court noted in Philadelphia, 437 U.S. at 624, that "[t]he crucial inquiry, therefore, must be directed to determining whether [a statute] is basi-

cally a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." "In either situation, the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp., 476 U.S. at 579.

Philadelphia v. New Jersey involved a statute having discriminatory intent and effect which prohibited out-of-state waste from being deposited in New Jersey. This Court characterized it as "a state law purporting to promote environmental purposes" but "in reality [constituting] 'simple economic protectionism.'" Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1982). The justifica-

tion given for New Jersey's ban of waste at its borders was considered as "merely a sham or a '*post hoc* rationalization.'" *Maine*, 477 U.S. at 148-149.

Both the Circuit Court and the District Court recognized that New Jersey's ban on out-of-state waste was significantly dissimilar to St. Clair County's prohibition against out-of-county waste as authorized by the Solid Waste Management Act. Both courts specifically noted that Petitioner had not alleged that state officials were acting to prohibit the importation of all out-of-state waste into the state:

> "... The stated goal of St. Clair County's plan was to preserve, protect, and manage its landfills with respect to disposition of the County's own solid waste. This policy treats both out-of-county Michigan solid waste and outside Michigan solid waste equally. If, in fact, it were alleged or proven that

all counties in Michigan, pursuant to MSWMA or MDNR direction or policy, banned out-of-state waste, we would be facing a different and difficult problem under City of Philadelphia v. New Jersey." 913 F.2d 413, 418; Petitioner's App. at 10a.

"... plaintiff has not alleged that this [state] official has used this authority to reject county plans proposing the importation of out-of-state waste." Id., at 417; Petitioner's App. at 9a-10a, quoting from Kettlewell v. Michigan Department of Natural Resources, 432 F. Supp. 761, 764 (1990).

* * *

"Unlike the New Jersey law, the MSWMA does not place the authority to issue a blanket preclusion against the importation of all out-of-state waste into one state official's hands. Instead, the MSWMA grants each county discretion in accepting or denying importation of waste from any outside source, including other counties within the State. Although ultimate authority for acceptance of a county's plan resides with a single official under the MSWMA, Mich. Comp. Laws Ann. §§ 299.425 and 299.429, the plaintiff has not alleged that this official has used this authority to reject county plans proposing the importation of out-of-state waste." 432 F. Supp. 761, 764; Petitioner's App. at 18a.

* * *

> "Again, the plaintiff does not posit that appearance on a county plan, while ostensibly an insubstantial burden, nevertheless is a practical impossibility for any out-of-state waste generator seeking to utilize Michigan's landfills. Without such an allegation, the Court concludes that the incidental effect on interstate commerce imposed by the MSWMA is not clearly excessive in relation to the benefits derived by Michigan from the statute." Id., at 765; Petitioner's App. at 19a.

* * *

> "Similarly, in the present case, the plaintiff does not allege that, as a result of St. Clair County's policy, disposition of out-of-state waste in Michigan is a practical impossibility." Id., at 766; Petitioner's App. at 21a.

The lower courts correctly held that the statutes at issue do not discriminate on their face in that in-state waste is not treated more favorably than out-of-state waste. The requirement that importers appear in a county waste disposal

plan applies equally to both Michigan counties outside of the county adopting the plan and to out-of-state entities. 432 F. Supp. 761, 764; Petitioner's App. at 18a; 913 F.2d at 418; Petitioner's App. at 10a. Both courts concurred that the Solid Waste Management Act was not discriminatory in effect since it "poses no flat prohibition against the importation of out-of-state waste into Michigan landfills." Id.

The Solid Waste Management Act was enacted after this Court's decision in Philadelphia. Its purpose was not simply to preserve existing landfill capacity as was the purpose of the New Jersey statute, but to create sufficient disposal capacity to meet Michigan's waste problem. Under the SWMA, each county

must assure through a county plan sufficient disposal capacity to meet at least its residents' own needs. Availability of capacity arises by the siting of new or expanded disposal facilities as required by the SWMA through the county plans. The siting criteria in the county plans preempt inconsistent local zoning ordinances that would otherwise prevent disposal facilities from being developed. Mich. Comp. Laws Ann. § 299.430(4) (1991 Supp.), Respondents' App. at 10a; County of Saginaw, 150 Mich. App. at 677; 387 N.W.2d 144. The statute is an affirmative means of dealing with the waste problem, yet allowing a certain degree of county control over the nature, siting and quantity of disposal facilities. The statutory ability of a county to define the area it must plan for is rationally

based and serves legitimate local interests in assuring that waste is properly managed. Any effect on interstate commerce is purely incidental and not based on discriminatory intent or purpose.

Subsequent to Philadelphia, this Court held in Sporhase v. Nebraska, 458 U.S. 941, 957 (1982), that a Nebraska statute that prohibited the withdrawal and transportation of ground water for use in an adjoining state without the permission of a state official was not discriminatory on its face under the Commerce Clause despite the absence of a similar requirement for intrastate transfers. The portion of the Nebraska statute which the Court found not to offend the Commerce Clause was as follows:

> "'Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit. ...'" 458 U.S. at 944.

The Court took note of the even-handedness of Nebraska's statutory scheme as applied in that the state imposed, through an agency, stringent controls on intrastate transfers of water from the water control district in which the appellant owned property. Still, if one were to subscribe to Petitioner's arguments in this case, the Nebraska statute at issue in Sporhase clearly discriminated against interstate commerce on its

face by favoring in-state users of water who were not required to obtain state permission prior to its usage.

In Sporhase, this Court found that although water is a natural resource, conservation efforts undertaken by the state made the continuing availability of ground water "not simply happenstance":

> "Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage."
> (Citations omitted) 458 U.S. at 957.

This Court held that while Commerce Clause concerns were implicated by the fact that the statute applied to interstate transfers but not to intrastate transfers, legitimate reasons for the

special treatment accorded requests to transport ground water across state lines existed which allowed Nebraska to conserve and preserve for its own citizens a vital resource in times of severe shortage. 458 U.S. at 955-956. Because restrictions were imposed upon certain intrastate transfers by the Nebraska Department of Water Resources in areas where adequate ground water supply was determined to be unavailable was, to the court, evidence of the even-handedness of the statute insofar as its treatment of interstate and intrastate interests:

> "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." 458 U.S. at 955-956.

Unlike the ground water in the Sporhase case, a natural resource in

which concerns arise regarding a state's effort to "hoard" such resources for the benefit of its citizens,[2] landfills are not a natural resource, but are manufactured facilities. While the refuse being deposited in the landfill is considered an article of commerce, what is being bought and sold is landfill space, an article of commerce in its own right. One pays the landfill operator for the right to consume the space, i.e. the right to deposit the article of commerce. Just as with the continuing availability of water in Nebraska, availability of landfill capacity in Michigan is not happenstance but a product of a compre-

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[2]Philadelphia, 437 U.S. at 627 (citing West v. Kansas Natural Gas Co., 221 U.S. 229 (1911), and Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

hensive statutory scheme that mandates siting of disposal facilities to meet projected needs. Being a resource created by operation of law, Michigan landfills have the "indicia of a good publicly produced and owned in which a State may favor its own citizens. ..." Sporhase, 458 U.S. at 957.

This is especially compelling since the Solid Waste Management Act, while dealing with the waste problem, also mandates that the more waste that flows into a county from outside sources, the more the county must respond under the SWMA by the siting of even more landfills or similar other disposal facilities through the county planning process. Landfills or incinerators are rarely viewed by municipalities or their residents as

desirable because of the potential long term threat to the environment, their unsightliness, the odors, the increased truck traffic, the impact on property values and the fact that the land is not suited for much of anything after being filled with garbage and sealed in plastic. In fact, it is the strong disdain for landfilling and incinerators that led to the parochial zoning measures by municipalities which have been preempted by the SWMA.

The county residents are burdened by the SWMA with the obligation of creating disposal facilities to meet at least their own waste disposal needs. It is appropriate that a county and its residents also should have some control over the amount of land consumed within a

county by being able to define the area to be served. A free flow of waste into the county as advocated by Petitioner would simply not be workable under Michigan's mandate that continuing landfill or other disposal capacity be constantly assured by the counties, as well as its effort to reduce and eliminate dependence on landfilling as a means of waste disposal except for unusable residuals by the year 2005. Mich. Comp. Laws Ann. § 299.432(4) (1991 Supp.). While many counties allow importation of waste where it is economically beneficial or prudent, all counties must be able to identify and control the area served in order to properly manage disposal capacity and the amount of land consumed for disposal of waste.

The SWMA is not a saddling of a problem on those outside of the state as in Philadelphia, 437 US at 629, or an "economic protectionist" measure, Id. at 624, but a legitimate exercise of police power dealing with Michigan's waste problem and related matters of local importance in which public health and welfare is implicated. The even-handedness of Michigan's statutes is clear on their face in that the burden is placed on both in-state and out-of-state interests which are impacted by the regulation. Sporhase v. Nebraska, 450 U.S. 941, 956-957 (1982). "The existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." South Carolina State Highway Dep't. v. Barnwell Bros., Inc., 303 U.S. 177, 187 (1938), cited in Minnesota v Clover Leaf Creamery Co., 449 U.S. at 473, n. 17.

Petitioner asserts that the lower courts erred by not following Dean Milk Co. v. Madison, 340 U.S. 349 (1951), Brimmer v. Rebman, 138 U.S. 78 (1891), and Polar Ice Cream and Creamery Co. v. Andrews, 375 U.S. 361 (1964). Each of the cases significantly differ from the instant case in that the laws at issue were specifically designed and expressly found by the Court to be protectionist measures favoring local economic

interests.[3] The Solid Waste Management Act is intended to address a legitimate state and local health concern and not designed to favor local economic interests or to otherwise have a discriminatory purpose or effect.

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[3]Dean Milk, 340 U.S. at 354. "In thus erecting an economic barrier protecting a major local industry against competition from without this State, Madison plainly discriminates against interstate commerce." (Footnote omitted).

Polar Ice Cream, 375 U.S. at 375. "[The principles of Baldwin v. G.A.F. Sealing, Inc., supra] justify, indeed require, invalidation as a burden on interstate commerce at that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market."

Brimmer, 138 U.S. at 83. "It is, for all practical ends, a statute to prevent the citizens of distant states, having for sale fresh meats (beef, veal or mutton,) from coming into competition, upon terms of equality, with local dealers in Virginia."

Further, much of the Court's concern in Dean Milk was that the ordinance of a Wisconsin municipality, if found not to violate the Commerce Clause, could result in a multiplication of preferential trade areas similar in nature to any state-wide burden on interstate commerce. In this case, all of the solid waste management plans of Michigan's 83 counties were in existence and incorporated into the state solid waste management plan at the time the lawsuit was initiated. The plans were available for court scrutiny under the Commerce Clause. The specter of each county solid waste management plan resulting in a multiplication of preferential trade areas is, therefore, not a legitimate argument that can be made by Petitioner in this case.

Note also that Dean Milk held that Madison's regulation was not essential to the protection of public health and welfare. Here, we are dealing with garbage and where it is disposed--a vital matter of public health.

The Court of Appeals decision below is consistent with that of the Court of Appeals for the Ninth Circuit in Evergreen Waste Systems, Inc. v. Metropolitan Service District, 820 F.2d 1482 (9th Cir. 1987), and the Court of Appeals for the Eleventh Circuit in Diamond Waste, Inc. v. Monroe County, Georgia, 939 F.2d 941 (11th Cir. 1991). As of this date, there are no decisions in conflict with the decisions of the three circuit courts of appeals.

CONCLUSION

In the words of this Court involving Commerce Clause analysis, "[t]he crucial inquiry, therefore, must be directed to determining whether [a statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns with effects upon interstate commerce that are only incidental." Philadelphia, 437 U.S. at 624. The state statutes at issue, which are part of an act addressing the solid waste problem in Michigan, are directed to legitimate local concerns with only an incidental effect upon interstate commerce. The statutes, in their even-handed approach to out-of-county as well as out-of-state waste, do not violate the Commerce Clause on their face. Peti-

tioner's inference that the statutes have created a state-wide ban on out-of-state waste is not supported by any factual record, nor even alleged in its complaint.

The decision of the Court of Appeals for the Sixth Circuit is in accord with prior decisions of this Court as well as those of other courts of appeals and, therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Gay Secor Hardy
Solicitor General
Counsel of Recored
P.O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Thomas J. Emery
James E. Riley
Assistant Attorneys General

Attorneys for Respondents

APPENDIX

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Mich. Comp. Laws Ann. § 299.425
Solid waste management plans

(1) Each solid waste management plan shall include an enforceable program and process to assure that the nonhazardous solid waste generated or to be generated in the planning area for a 20-year period is collected and recovered, processed, or disposed of at disposal areas which comply with state law and rules promulgated by the department governing location, design, and operation of the disposal areas.

(2) An initial solid waste management plan shall be prepared and approved under this section and shall be submitted to the director not later than January 5, 1984. The initial plan shall be prepared for a 20-year period and shall be reviewed and updated every 5 years. An

updated plan and an amendment to a plan shall be prepared and approved as provided in sections 25, 26, 27, 28, and 29. The solid waste management plan shall encompass all municipalities within the county. The plan shall at a minimum comply with the requirements of section 30. The solid waste management plan shall take into consideration solid waste management plans in contiguous counties and existing local approved solid waste management plans as they relate to the county's needs. At a minimum, a county preparing a solid waste management plan shall consult with the regional planning agency from the beginning to the completion of the plan.

(3) Not later than July 1, 1981, each county shall file with the director and with each municipality within the county

on a form provided by the director, a notice of intent, indicating the county's intent to prepare a county solid waste management plan or to upgrade an existing plan. The notice shall identify the designated agency which shall be responsible for preparing the county plan.

(4) If the county fails to file a notice of intent with the director within the prescribed time, the director immediately shall notify each municipality within the county and shall request those municipalities to prepare the county solid waste management plan and shall convene a meeting to discuss the plan preparation. Within 4 months following notification by the director, the municipalities shall decide by a majority vote of the municipalities in the county whether or not to file a notice of intent

to prepare the county solid waste management plan. Each municipality in the county shall have 1 vote. If a majority does not agree, then a notice of intent shall not be filed. The notice shall identify the designated agency which shall be responsible for preparing the county plan.

(5) If the municipalities fail to file a notice of intent to prepare a county solid waste management plan with the director within the prescribed time, the director shall request the appropriate regional solid waste management planning agency to prepare the county solid waste management plan. The regional solid waste management planning agency shall respond within 90 days after the date of the request.

(6) If the regional solid waste man-

agement planning agency declines to prepare a county plan, the director shall prepare the plan for the county and that plan shall be final.

(7) A solid waste management planning agency, upon request of the director, shall submit a progress report in preparing its solid waste management plan.

Mich. Comp. Laws Ann. § 299.430
Promulgation of plan rules; out-of-county waste; compliance and conflicts with plan

(1) Not later than September 11, 1979, the director shall promulgate rules for the development, form, and submission of initial solid waste management plans. The rules shall require all of the following:

(a) The establishment of goals and objectives for prevention of adverse effects on the public health and on the

environment, resulting from improper solid waste collection, processing, or disposal including protection of surface and groundwater quality, air quality, and the land.

(b) An evaluation of waste problems by type and volume, including residential and commercial solid waste, hazardous waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other wastes from industrial or municipal sources.

(c) An evaluation and selection of technically and economically feasible solid waste management options, which may include sanitary landfill, resource recovery systems, resource conservation, or a combination of options.

(d) An inventory and description of

all existing facilities where solid waste is being treated, processed, or disposed of, including a summary of the deficiencies, if any, of the facilities in meeting current solid waste management needs.

(e) The encouragement and documentation as part of the plan, of all opportunities for participation and involvement of the public, all affected agencies and parties, and the private sector.

(f) That the plan contain enforceable mechanisms for implementing the plan, including identification of the municipalities within the county responsible for the enforcement. This subdivision does not preclude the private sector's participation in providing solid waste management services consistent with the

county plan.

(g) Current and projected population densities of each county and identification of population centers and centers of solid waste generation, including industrial wastes.

(h) That the plan area has, and will have during the plan period, access to a sufficient amount of available and suitable land, accessible to transportation media, to accommodate the development and operation of solid waste disposal areas, or resource recovery facilities provided for in the plan.

(i) That the solid waste disposal areas or resource recovery facilities provided for in the plan are capable of being developed and operated in compliance with state law and rules of the department pertaining to protection of

the public health and the environment, considering the available land in the plan area, and the technical feasibility of, and economic costs associated with, the facilities.

(j) A timetable or schedule for implementing the county solid waste management plan.

(2) In order for a disposal area to serve the disposal needs of another county, state, or country, the service, including the disposal of municipal solid waste incinerator ash, must be explicitly authorized in the approved solid waste management plan of the receiving county. With regard to intercounty service within Michigan, the service must also be explicitly authorized in the exporting county's solid waste management plan.

(3) A person shall not dispose of,

store, or transport solid waste in this state unless the person complies with the requirements of this act.

(4) Following approval by the director of a county solid waste management plan and after July 1, 1981, an ordinance, law, rule, regulation, policy, or practice of a municipality, county, or governmental authority created by statute, which prohibits or regulates the location or development of a solid waste disposal area, and which is not part of or not consistent with the approved solid waste management plan for the county, shall be considered in conflict with this act and shall not be enforceable.

Mich. Comp. Laws Ann. § 299.432(1)
State plan, contents; county plans; studies; reports

The state solid waste management plan shall consist of the state solid waste

plan developed under the resource recovery act, Act No. 366 of the Public Acts of 1974, being sections 299.301 to 299.321 of the Michigan Compiled Laws, and all county plans approved or prepared by the director.

Administrative Rules Michigan Administrative Code, 1982 Annual Supplement.

R 299.4711 Plan format and content.

Rule 711. To comply with the requirements of the act and to be eligible for 80% state funding, county solid waste management plans shall be in compliance with the following general format and shall contain the following elements:

(a) An executive summary, which shall include all of the following:

(i) An overview.

(ii) Conclusions.

(iii) Selected alternatives.

(b) An introduction as follows:

(i) The introduction shall establish the goals and objectives for the prevention of adverse effects on the public health and the environment resulting from improper solid waste collection, transportation, processing, or disposal, including the protection of ground and surface water quality, air quality, and land quality.

(ii) The introduction shall also establish the goals and objectives for the maximum utilization of Michigan's solid waste through resource recovery, including source reduction and source separation.

(c) A data base that includes all of the following:

(i) An inventory and description of

all existing facilities where solid waste is being transferred, treated, processed, or disposed of, including all of the following:

(A) Physical location, size, and a delineation of private and public facilities.

(B) A description of solid waste type, volume or weight received, and current capacity.

(C) Deficiencies.

(ii) An evaluation of existing solid waste collection, management, processing, treatment, transportation, and disposal problems by type and volume, including residential and commercial solid waste, industrial sludges, pretreatment residues, municipal sewage sludge, air pollution control residue, and other solid wastes from industrial or municipal

sources, but excluding hazardous wastes.

(iii) Demographics of the county:

(A) Current and projected population densities and centers for 5- and 20-year periods.

(B) Identification of current and projected centers of solid waste generation, including industrial wastes for 5- and 20-year periods.

(iv) Current and projected land development patterns and environmental conditions as related to solid waste management systems for 5- and 20-year periods.

(d) Solid waste management system alternatives shall address the problems identified in subdivision (c)(ii) of this rule and shall include both of the following:

(i) Solid waste management compon-

ents, including all of the following:

(A) Resource conservation including source reduction.

(B) Resource recovery including source separation, materials, energy, and markets.

(C) Volume reduction.

(D) Sanitary landfill.

(E) Collection.

(F) Transportation.

(G) Ultimate disposal area uses, including recreational potential.

(H) Institutional arrangements.

(ii) Development of alternative systems which address all the solid waste management components. Each alternative system shall evaluate public health, economic, environmental, siting, and energy impacts. Capital, operational, and maintenance costs shall be developed for each

alternative system.

(e) Plan selection shall be based on all of the following:

(i) An evaluation and ranking of proposed alternative systems, including all of the following:

(A) Technical feasibility for 5- and 20-year periods.

(B) Economic feasibility for 5- and 20-year periods.

(C) Access to land for 5- and 20-year periods.

(D) Access to transportation networks to accommodate the development and operation of solid waste transporting, processing, and disposal facilities for 5- and 20-year periods.

(E) Effects on energy for 5- and 20-year periods; production possibilities and impacts of shortages on solid waste

management systems.

(F) Environmental impacts over 5- and 20-year periods.

(G) Public acceptability.

(ii) The selected alternative shall meet all of the following requirements:

(A) Include the basis for selection, a summary of evaluation, and ranking.

(B) Include advantages and disadvantages of the selected plan for all of the following factors:

(1) Public health.

(2) Economics.

(3) Environmental effects.

(4) Energy use.

(5) Siting problems.

(C) Be capable of being developed and operated in compliance with state laws and rules of the department pertaining to the protection of the public health and

environment considering the available land in the planning area and the technical feasibility of, and economic costs associated with, the alternative.

(D) Include a timetable for implementing the solid waste management plan.

(E) Be consistent with and utilize population, waste generation, and other planning information prepared under the provisions of section 208 of Public Law 92-500, 33 U.S.C. 1288.

(iii) Site requirements, including the following requirements:

(A) The selected alternative shall identify specific sites for solid waste disposal areas for the 5-year period subsequent to plan approval or update.

(B) If specific sites cannot be identified for the remainder of the 20-year period, the selected alternative shall

include specific criteria that guarantee the siting of necessary solid waste disposal areas for the 20-year period subsequent to plan approval.

(C) A site for a solid waste disposal area that is located in one county, but serves another county, shall be identified in both county solid waste management plans.

(f) Management component. Each solid waste management plan prepared pursuant to the act shall contain a management component which identifies management responsibilities and institutional arrangements necessary for the implementation of technical alternatives. At a minimum, this component shall contain all of the following:

(i) An identification of the existing structure of persons, municipalities,

counties, and state and federal agencies responsible for solid waste management, including planning, implementation, enforcement, and an assessment of all of the following:

(A) Technical and administrative capabilities.

(B) Financial capabilities

(C) Legal capabilities.

(ii) An identification of gaps and problem areas in the existing management system which must be addressed to permit implementation of the plan.

(iii) A recommended management system for plan implementation, which shall consist of all of the following elements:

(A) An identification of persons, municipalities, counties, and state and federal agencies assigned responsibilities under the plan, with a precise

delineation of planning, implementation, and enforcement responsibilities, including legal, technical, and financial capability for all entities assigned responsibilities.

(B) A process for ensuring the ongoing involvement of and consultation with the regional solid waste management planning agency.

(C) A process for ensuring coordination with other related plans and programs within the planning area, including, but not limited to, land use plans, water quality plans, and air quality plans.

(D) An identification of necessary training and educational programs, including public education.

(E) A strategy for plan implementation, including the acceptance of

responsibilities from all entities assigned a role within the management system.

(F) A financial program that identifies funding sources for entities assigned responsibilities under the plan.

(g) Documentation of public participation as follows:

(i) A record of attendance shall be maintained and included in an appendix to the plan.

(ii) Citizen concerns and questions shall be considered and responded to in the plan's appendix.